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No. 92-1956

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT JAMES E. GOTTSHALL

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QUESTIONS PRESENTED

1. Did the court of appeals properly base its decision upon an exacting scrutiny of the circumstances guided by common law developments as gauged by the FELA?

PARTIES TO THE PROCEEDING

This matter involves two cases on writ of certiorari to the United States Court of Appeals for the Third Circuit. The parties to *Gottshall v. Consolidated Rail Corporation*, in respect of which this Brief is submitted, are petitioner Consolidated Rail Corporation, a publicly-held corporation, and respondent James E. Gottshall, an adult citizen and resident of the Commonwealth of Pennsylvania. Petitioner is the defendant in the district court and was the unsuccessful appellee in the court of appeals. Respondent is the plaintiff in the district court and was the successful appellant in the court of appeals.

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STATEMENT OF THE CASE

The court of appeals based its decision in *Gottshall* primarily upon an exacting scrutiny of the facts. The court of appeals found that an exacting scrutiny of the facts as they bear upon an employer's duty to provide a safe workplace, the nature of the alleged tortious conduct, the injury and the underlying equities was the best way to reconcile the FELA's remedial purpose of providing recovery to injured workers with the restrictive function of state common law emotional injury tests and obtain a threshold assurance that emotional injury claims brought pursuant to the FELA involve genuine and serious emotional injury. Because respondent seeks this Court to sustain the fact-intensive approach adopted by the court of appeals, consistent with this Court's opinion in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987),[1] rather than to impose any particular state common law test upon the FELA or to promulgate some other "bright line" rule, respondent includes the ensuing detailed discussion of the factual background of this case, as set forth in the opinion of the court of appeals.[2] Under a fact-intensive approach, a detailed review of the facts

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[1] In *Buell*, this Court indicated that, "whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case." 480 U.S. at 568.

[2] References to the opinion of the court of appeals are cited to the appendix submitted by petitioner in support of the petition for certiorari (hereinafter designated as "A-___"). References to the joint appendix submitted to the court of appeals by the parties in *Gottshall* are herein designated as "GA-___." References to the parties' joint appendix to this Court are hereinafter designated as "JA-___."

would seem to be required by Supreme Court Rule 24.1(g), calling for the inclusion herein of "all that is material to the consideration of the questions presented."

A thorough scrutiny of the facts involved in *Gottshall* reveals the convergence of numerous circumstances which, taken together, demonstrate the seriousness of respondent's emotional injuries and the genuineness of their causal connection to petitioner's negligence. By way of summary, these circumstances include: (i) petitioner's forcing respondent and his co-workers to perform heavy physical labor at an accelerated pace, without breaks, in the midst of a record heat wave; (ii) petitioner's failure to provide emergency communications access; (iii) the advanced ages and poor physical conditioning of most of the men; (iv) the resulting death and collapse of one of respondent's co-workers and close friends, Richard Johns; (v) respondent's intimate and active involvement with Mr. Johns' death; (vi) petitioner's forcing respondent back to work under the same conditions that had killed Mr. Johns, while Mr. Johns' body laid in open view on the ground; (vii) respondent's subsequent emotional collapse and psychiatric institutionalization for major depression and severe post-traumatic stress disorder with attendant physical injuries including forty-pound weight loss, nausea, cold sweats, suicidal preoccupation and sleep onset insomnia.

The first component of the atypically severe working conditions to which petitioner subjected respondent and his co-workers was the weather. The day in question occurred during one of the worst heat waves in recent memory. Respondent's boss, Track Supervisor William Yetter, admitted to being unable to recall a spell which had been so hot for so long since the 1940's (A-47). As accurately summarized by the court of appeals, "[o]n the

day of the accident, the temperature was hovering at 97 degrees; it was very humid; the sun was shining; the field was in the open; and work started at high noon" (A-49). As a result of these conditions, the workers were apprehensive, and they complained repeatedly to their supervisors (GA-00059, 64, 68).

That the weather conditions were serious enough to warrant special care is admitted by petitioner. Dr. David Deubner, petitioner's Chief Medical Officer stated that under such conditions, "[i]f people are doing very heavy cardiovascular labor, then it should be slowed down and have longer work breaks, more frequently longer breaks when it gets very hot and humid . . . that's why when the sun gets too high, you recommend slowing down and having more rest" (A-47 to A-48).[3]

Contrary to Conrail's policy of slowing down in the face of extreme weather conditions, respondent's supervisors actually accelerated the pace of the work and, to make matters worse, disallowed scheduled work breaks and discouraged unscheduled breaks (A-3). Importantly, all of these actions were in contrast to the usual working conditions to which respondent and his co-workers were normally subjected. As stated by the court of appeals,

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[3] Dr. Deubner also advocated what he referred to as an employee's "safe function capacity," which he explained as the matching of an employee's job to his physical health (A-48). The conditions faced by respondent and his co-workers on the date of the accident were a clear violation of this concept. The man who died for example, Mr. Johns, was 56 years old, significantly overweight, suffered from high blood pressure, athero or arteriosclerotic cardiovascular disease, and was taking medication (*id.*). Moreover, petitioner knew that many if not most of respondent's other co-workers were overweight and between fifty and sixty years of age. One of them had previously suffered a heart attack (*id.*).

"[t]here is . . . evidence that conditions that day were anything but 'ordinary,' much less characterized as 'negotiated circumstance' " (A-53). According to one of respondent's co-workers, "[t]he conditions at the Watsontown Secondary on the date of the accident were substantially more severe than the general working conditions associated with the job. The extreme heat and humidity, and the pace of the work, were unbearable" (*id.*). Another of respondent's co-workers that day attested that, "[w]orking on a division gang can be strenuous. However, the situation on the date of Mr. Johns' death, involving extreme heat, no breaks, no shade and being pushed very hard, was something different" (A-53 to A-54). As respondent himself described it, "[i]t was 97 degrees. It was hot and humid. They put us out there to change rails, push, push, push . . . I'm not an animal" (A-54).

After two and one half hours of continuous toil under these extreme conditions, Richard Johns, one of respondent's co-workers, and a close friend of fifteen years, collapsed. Though Mr. Johns was pale and sweating profusely, supervisor Michael Norvick neither took Mr. Johns from the worksite nor sought medical assistance. Indeed, Mr. Norvick ordered Mr. Johns' co-workers to stop assisting Mr. Johns and get back to work (A-3). About five minutes after they did so, respondent saw Mr. Johns collapse a second time. At that point, respondent rushed to Mr. Johns, where he confronted a gruesome sight: "Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth" (*id.*). For the next forty-five minutes, respondent desperately administered cardiopulmonary resuscitation, during which he intermittently wept and urged Mr. Johns'

to revive, repeating, "[c]ome on Dick, breathe, breathe" (A-5).[4]

While respondent tried to revive Mr. Johns, supervisor Norvick was busy speeding along old country roads searching for a place to telephone for help (A-4). Under normal circumstances, Mr. Norvick simply could have called on his Conrail communications equipment. On the date of Mr. Johns' death, however, the equipment was useless because petitioner had taken its Turbotville, Pennsylvania base station off the air for repairs, without telling anyone (*id.*). Eventually, Mr. Norvick was able to summon help and led a team of paramedics to the remote worksite. By then, it was too late for Mr. Johns.

As supervisor Norvick saw it, however, it was not too late to finish the job, and he ordered the men back to work. While respondent and the others endeavored to complete their task in the same weather conditions that had killed Mr. Johns, Mr. Johns' corpse laid in open view on the gravel beside the track and "bake[d] like a potato" (A-52, A-54). Even after the work was finished, Mr. Norvick required the men to remain at the worksite until the coroner arrived, which was not for a full three hours after Mr. Johns' death (A-52).[5]

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[4] Though supervisor Norvick had thought CPR training was a good idea because of the men's ages, and scheduled training sessions with the American Red Cross, petitioner's safety director had cancelled the sessions because of the "liability factor" (GA-00032 to GA-00033). Thus, Gottshall was the only person at the worksite who knew how to administer CPR.

[5] In affidavit, the coroner expressed his opinion that Mr. Johns died from a heart attack brought on by excessive heat and humidity in conjunction with heavy physical exertion. The coroner also opined that had Mr. Johns received prompt medical attention, his chances of survival would have been materially enhanced (GA-00072 to GA-00073).

The following day, when respondent reported to work, he was reprimanded for administering CPR to Mr. Johns and, along with his co-workers, sent back to work under the same extreme weather and working conditions that had killed Mr. Johns (A-5). During this time, respondent became increasingly afraid that he would die as had his friend, Mr. Johns. Respondent started feeling sick and lost his appetite (*id.*). A few days after Mr. Johns' funeral, respondent informed his supervisor he was sick and wanted to go home.

When respondent arrived home, he retreated into his basement, where he was found several days later by his father. Shortly afterward, respondent was admitted to the Northwestern Institute of Psychiatry (*id.*). He remained there for three weeks, during which time he was diagnosed as suffering from major depression and post-traumatic stress disorder. In addition to loosing forty pounds, respondent suffered suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving his home. Since his discharge, respondent has continued to receive outpatient psychological treatment (*id.*).[6]

Respondent filed a complaint against petitioner with the United States District Court for the Eastern District of Pennsylvania, raising a claim of negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq.* The district court granted petitioner's motion for summary judgment (A-91 to A-105), primarily on the grounds that respondent failed

[6] Respondent's claim does not represent one for wholly emotional injuries.

to satisfy the "zone of danger" test adopted by the Pennsylvania Supreme Court (A-97 to A-100). Inexplicably disregarding virtually the entire factual record relating to petitioner's negligence, the district court also found that respondent failed to satisfy the traditional common law tort elements of foreseeability and causation (A-100 to A-105).

The court of appeals reversed the district court (A-1 to A-72). Taking to heart this Court's pronouncements in *Buell,* the court of appeals reviewed in detail the circumstances surrounding respondent's emotional collapse. Recognizing the conflict between the restrictive state common law emotional injury tests and the remedial policy of the FELA, the court of appeals charged itself with reconciling the two bodies of law by, "discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action" (A-24). The court of appeals reasoned that the best way to promote the policies underlying both the FELA and the state common law tests was through an exacting scrutiny of the facts to determine whether a plaintiff's claim (i) had a "solid basis" in common law and (ii) satisfied traditional tort elements. Because Gottshall's claim met both burdens, the court of appeals reversed the district court.

SUMMARY OF THE ARGUMENT

The fundamental decision before this Court is whether the legal sufficiency of FELA emotional injury claims should be determined through an exacting scrutiny of the facts of each case or is to be dictated by the artificial restrictions of state common law. Respondent respectfully argues that the resolution of this decision lies

in (i) the FELA's remedial goal of providing recovery to injured railroad workers and the broad wording of the Act and broader construction given the Act by this Court to accomplish that end, (ii) the restrictive function of the state common law tests, (iii) the repudiation of all but one of the policy justifications for the common law tests; and (iv) the inapplicability of the remaining policy justification – subjecting tortfeasors to "unlimited liability" – in the context of the FELA.

The FELA was enacted as an avowed departure from common law tort principles restricting recovery. The purpose of the FELA was to eliminate traditional defenses to tort liability and facilitate recovery for injured rail workers. To accomplish that end, Congress fashioned the FELA in the broadest possible terms and expanded the role of the jury in FELA cases. Consistent with Congress's objectives, this Court has construed the Act broadly, refusing to read restrictions into the FELA's language and showing its willingness to depart from common law principles when necessary to facilitate recovery under the Act.

Squarely contradicting the remedial goal of the FELA is the restrictive function of the various tests devised by state common law to "weed out" problematic emotional injury claims and prevent subjecting tortfeasors to potentially unlimited liability. Insofar as these tests operate to exclude whole categories of claims as a matter of law, they are offensive both to the remedial goal of the FELA and to the expanded role of FELA juries.

Recognizing (a) the "fundamental tension" between the FELA and the restrictive state law limitations (b) that "FELA liability is distinctly a federal question" and that the state law tests "do not necessarily etch the contours of the federal right," and (c) that the state law tests are

arbitrary and provide only a "dubious method" of weeding out unmeritorious claims, the court of appeals properly declined to adopt or strictly apply any of the common law tests or otherwise to promulgate a "bright line" rule. Instead, the court of appeals looked to whether petitioner's claim had a "solid basis" in common law sufficient to provide a "threshold assurance" that petitioner suffered "genuine and serious emotional injury." The court of appeals then reviewed the factual record to determine if there was enough evidence to satisfy the traditional negligence elements of duty, breach of duty, causation and injury. The court of appeals concluded that, under the totality of the circumstances, petitioner is entitled to a trial on the merits.

Petitioner's arguments against the court of appeals' approach are unpersuasive. Initially, petitioner's position that the FELA does not permit recovery based upon a "bare showing that an injury is genuine and foreseeable" is premised upon a mischaracterization of the court of appeals' approach, which, as indicated above, involved a detailed examination of the factual record to determine not only the genuineness and foreseeability of respondent's injuries, but a determination whether respondent's claim was both solidly grounded in the common law of emotional injury as well as sufficient under traditional negligence requirements. Petitioner's second argument, that the FELA was meant to cover only physical injuries peculiar to the railroad, squarely contradicts the Act's broad language and construction, and identical arguments were long ago rejected by this Court.

Petitioner's request that this Court adopt the "zone of danger" test to protect the railroad's from "unlimited"

"ruinous" and "random" liability demonstrates a fundamental failure to grasp the FELA's own express limitations on the class of potential plaintiff's in FELA emotional injury cases to such of a negligent carrier's *own employees* who can prove a *causal nexus* between their emotional injuries and their own jobs. Succinctly, the common law fear that "bystander" and other "foreseeability" tests will subject tortfeasors to claims by all manner of friend and relative of a physically injured victim simply cannot occur under the FELA.

Finally, the cries of petitioner and its *amici* that allowing railroaders to assert FELA claims for emotional injuries will expose the railroads to exponential damages, and the courts to an avalanche of cases alleging minor emotional upset, are unrealistic. Such arguments fail to consider (i) the diversity of psychological make-ups among railroad employees, (ii) FELA plaintiffs' burden of proving traditional negligence elements of duty, breach of duty, causation and injury, (iii) the minor awards juries would award for minor injuries, and (iv) the arbitration forum provided through the Railway Labor Act.

ARGUMENT

I. STATE COMMON LAW TESTS OPERATE IN CONFLICT WITH THE FELA

A. The FELA Is An Avowed Departure From Common Law Tort Principles Restricting Recovery

Because this matter involves the scope of a right created by federal statute, federal law controls the contours of that right. *See Urie v. Thompson*, 337 U.S. 163, 174

(1949).[7] Thus, it is necessary to look to the purposes, language and historical construction of the Federal Employers' Liability Act (the "FELA," or the "Act").

The FELA was intended as a departure from common law. *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 329 (1958) (FELA is "an avowed departure from the rules of common law"). Accordingly, this Court has indicated its displeasure at lower courts which failed "to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action"). *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 509-10 (1957).

As recently recognized by this Court, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987). To achieve the Act's end of facilitating recovery in meritorious cases, Congress did not codify common law principles but fashioned the FELA in "the most general terms." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). Stated otherwise, the Act was defined in language "as broad as could be framed." *Urie v. Thompson*, 337 U.S. at 181.

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[7] In *Urie*, the primary issue before this Court was whether the Act's coverage included causes of action for occupational diseases, such as silicosis, or was limited to injuries arising from discrete "accidents." Another issue before this Court was the correctness of the Missouri Supreme Court's holding that the plaintiff did not make out a case of negligence. On that issue, this Court recognized that,

> [w]hat constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes.

337 U.S. at 174.

> On its face, *every injury* suffered by any employee while employed by reason of the carrier's negligence was made compensable. *The wording was not restrictive as to* the employees covered; the cause of the injury, except that it must constitute negligence attributable to the carrier; or *the particular kind of injury resulting.*

Id. (emphasis added).

Consistent with the FELA's purpose and language, this Court has recognized the Act as a "broad remedial statute, and [has] adopted a 'standard of liberal construction in order to accomplish [Congress'] objects.' " *Buell*, 480 U.S. at 562, *quoting Urie v. Thompson*, 337 U.S. at 180. *See Kernan v. American Dredging*, 355 U.S. at 432, *citing Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) ("the general congressional intent was to provide liberal recovery for injured workers"). Thus, this Court has viewed as inconsistent with the spirit of the FELA "nice distinctions in applying the Act's broad and general terms, or cutting down their full scope by inference or implication," *Urie v. Thompson*, 337 U.S. at 186. As stated in *Urie*:

> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

337 U.S. at 181-2.

This Court also has recognized congressional intent in creating the Act to fashion a remedy that would not be "static," but which, "would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging*, 355 U.S. at 432. Thus, when called upon to

expand upon or depart from restrictive common law principles, this Court has done so. *See Urie v. Thompson* ("injury" as employed in the Act held to include occupational diseases); *Kernan v. American Dredging* (negligence per se extended beyond common law limits). *See also Rogers v. Missouri Pacific R. Co.*, 352 U.S. at 506 (recognizing the FELA's relaxed causation requirement). As this Court pointed out in Buell, although the Act's text mentions only negligent torts, it has been construed to cover certain intentional torts as well. 480 U.S. at 562, n.8.

The importance of the above-stated principles of FELA jurisprudence is that, although courts construing the FELA should "glean guidance" from common law developments, *Buell*, 480 U.S. at 568, they must not mechanically superimpose common law tests onto the FELA. As the court of appeals stated in *Gottshall:*

> In FELA cases, more so than common law negligence actions, we must curtail arbitrary line drawing so that the remedial and humanitarian goals of the statute can be fully implemented. To the extent doctrinal requirements of the common law encroach upon FELA policies and preclude remedies in meritorious cases, the common law must bow.

(A-39 to A-40).

B. The Purpose and Effect Of The State Common Law Tests Is To Restrict Claims

Precisely contrasting the FELA's aim of providing recovery to injured rail workers and the liberal construction given the Act by the courts to achieve that end is the restrictive panoply of common law emotional injury tests continuously being adopted, revised and then rejected by the state courts. Whereas the organizing principle of the FELA is to afford causes of action to injured claimants,

the purpose of the state law tests is just the opposite. Whereas the FELA is, in essence, inclusionary, the common law tests are "based upon a theory that liability is the *extraordinary exception.*" Gottshall (A-11) (emphasis added).

The litany of concerns offered as necessitating the common law restrictions are well-known to the courts and commentators. Generally, they consist of the fears of (i) the potential for fraudulent claims; (ii) a "flood" of litigation; (iii) the inability of medical science to determine causation; and (iv) a reluctance to subject defendants to an unlimited class of remote and unforeseeable claimants. *See* Bell, *The Bell Tolls: Toward A Full Recovery For Psychic Injury*, 36 U. Fla. L. Rev. 333, 347 (1984) (hereinafter referred to as "Bell, *The Bell Tolls*"); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84, 85 (1970). *See also Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F. Supp. 135, 139 (S.D.N.Y. 1987), *quoting* Prosser & Keeton, *The Law of Torts*, Section 54 (5th Ed. 1984); *Bass v. Nooney Co.*, 646 S.W.2d 765, 769 (Mo. 1983) (*en banc*).

Tellingly, these concerns did not arise as enlightened jurists grappled with problems in handling emotional injury cases, but were articulated telescopically, before the courts had any experience with this type of claim. Thus, ninety-seven years ago, in the then landmark case in *Mitchell v. Rochester Railway Co.*, 151 N.Y. 107, 45 N.E. 354 (1896), adopting what has come to be known as the "physical impact" rule, the court *intuited* that:

> "[i]f the right of recovery in this class of cases[8] should be once established, it would naturally result in a flood of litigation in cases where the

[8] In *Mitchell*, the plaintiff claimed to have been frightened and caused to suffer a miscarriage when a horse-drawn buggy almost struck her.

> injury complained of may be easily feigned without detection, and where damages must rest upon mere conjecture or speculation. . . . To establish such a doctrine would be contrary to principles of public policy."

45 N.E. at 354-55. See Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 784 (1988) (hereinafter, "Comment, *Jurisdictional Survey.*").[9]

Consistent with the spontaneous generation of an underlying policy basis, the case law in this area did not develop in a principled fashion. Instead, the courts began with a "bright line" rule barring claims for emotional injury unaccompanied by physical impact from which they were forced into an odyssey of limited retreats as they were faced with new fact patterns. *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758, 762 (1974); *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912, 924-5 (1968); *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 395 S.E.2d 85, 88 (1990) ("The tort of negligent infliction of emotional distress apparently has a long and winding history in every state"); Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 103 (1959). As stated in *Leong v. Takasaki*:

[9] *Mitchell* was one of the first cases adopting the impact rule in the United States, along with *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897). The rule is credited with having been developed in England, in *Victorian Railways Commissioners v. Coultas*, 13 App.Cas 222 (P.C. 1888), though it was overruled there only thirteen years later in *Dulieu v. White & Sons*, 2 K.B. 669 (1901). *See Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983) (*en banc*); *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214, 217, n.2 (1973).

> A survey of cases . . . does not show the development of a logical and consistent rule, but reveals that the trend is a hesitant abandonment of . . . artificial restrictions and barriers to recovery in favor of a greater reliance on general tort law principles and the contemporary sophistication of the medical profession to test the veracity of claims for relief.

520 P.2d at 762. Pennsylvania, California and Washington appear to be good examples of this process. *See Gottshall* (A-60 to A-61, n. 8); *Dillon v. Legg*, 441 P.2d at 924-5; *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1101-02 (1976).

Although the policy considerations purportedly underlying the state law tests have been soundly discredited by the commentators and courts alike, as will be discussed in detail below, virtually all of the state courts remain obsessed with drawing, erasing and then re-drawing artificial lines in the sand as their preferred method of excluding potentially troublesome claims. The unfortunate effect of the state courts tests is to exclude many genuine claims of serious emotional injury. The "physical impact" rule, for example, is underinclusive of whole categories of meritorious claims now recognized by most states, including "bystander" and "zone of danger" claims.

In addition to being underinclusive, the impact rule has been criticized as irrational because the physical "impact" separating allowed from disallowed claims for emotional injury was often trivial and not causally related to the claimed emotional injury, and therefore provided a dubious guarantee of the emotional injury's genuineness:

> "Apart from some quite untenable notions of causal connection, the theory seems to be that the 'impact' affords the desired guarantee that

> the mental disturbance is genuine. But the same courts have found 'impact' in minor contacts with the person which play no part in causing the real harm, and in themselves can have no importance whatever. 'Impact' has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye or the inhalation of smoke. . . . 'The magic formula "impact" is pronounced; the door opens to the full joy of a complete recovery.' A Georgia circus case has reduced the whole matter to a complete absurdity by finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap."

Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390, 394 & n.9 (1970), *quoting Prosser, The Law of Torts*, pp. 350-1 (3d ed.). *See also Johnson v. Rogers*, 763 P.2d 771, 780 (Utah 1988); *Robb v. Pennsylvania Railroad Co.*, 58 Del. 454, 210 A.2d 709, 714 (1965); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402, 405 (1941); *Williams v. Baker*, 572 A.2d 1062, 1067 (D.C. App. 1990); Comment, *Jurisdictional Survey* 790-1 ("recovery is denied in cases involving severe and objectively verifiable psychic trauma, and is available for minor distress following a negligible impact").

Because of its under inclusiveness and irrationality, the impact rule has been abandoned by all but a handful of states. *Outten v. National Railroad Passenger Corporation*, 928 F.2d 74,78 (3d Cir. 1991), *citing* Comment, *Jurisdictional Survey* 792-3 & n. 59.[10]

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[10] Presently, the only states adhering to the physical impact rule are Arkansas, Georgia, Indiana, Kentucky, Kansas and Oregon. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *OB-GYN Associates of Albany v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989); *Comfax Corp. v. North American Van Lines, Inc.*, 587 N.E.2d 118 (Ind. Ct. App. 1992); *Wishard Memorial Hospital v. Logwood*, 512 N.E.2d 1126 (Ind. Ct. App. 1987); *Anderson v.*

As a somewhat less restrictive substitute for the physical impact requirement, fourteen jurisdictions have adopted the "zone of danger" test. *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 757 P.2d 105 (Ct. App. 1988); *Kimelman v. City of Colorado Springs*, 775 P.2d 51 (Colo. Ct. App. 1988), *cert. denied*, 493 U.S. 981 (1989); *Robb v. Pennsylvania Railroad*, 58 Del. 454, 210 A.2d 709 (1965); *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990); *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 457 N.E.2d 1 (1983); *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595 (Mo. 1990) (*en banc*); *Jensen v. L.C. Whitford Co., Inc.*, 167 A.D. 826, 562 N.Y.S.2d 317 (1990); *Whetham v. Bismarck Hospital*, 197 N.W.2d 678 (N.D. 1972); *Shelton v. Russel Pipe and Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992); *Jobin v. McQuillen*, 158 Vt. 322, 609 A.2d 990 (1992); *Estate of Wells v. Mount Sinai Medical Center*, 174 Wis.2d 503, 497 N.W.2d 779 (Ct. App. 1993).

Like the physical impact requirement before it, the zone of danger test has been widely-criticized as arbitrarily exclusionary of meritorious cases involving serious and foreseeable injuries. *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 436 (Me. 1982) (the rule "bars claims by reasonably foreseeable plaintiffs regardless of the authenticity and severity of the injury"); *Dzionkonski v. Babineau*, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300 (1978)

Scheffler, 242 Kan. 857, 752 P.2d 667 (1988); *Wilhoite v. Cobb*, 761 S.W.2d 625 (Ky. Ct. App. 1988), *citing Deutsch v. Schein*, 597 S.W.2d 141 (Ky. 1980); *Hammond v. Central Lane Communications Center*, 312 Or. 17, 816 P.2d 593 (1991).

("Although the zone of danger rule . . . provides a means of limiting the scope of . . . liability, it lacks strong logical support"); *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 763 (1983) ("We view the 'zone of danger' rule as being unduly restrictive"); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300, 306 (1979) (citing numerous cases criticizing rule); *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157, 169 (1992) (rejecting the zone of danger rule as "restrictive and harsh").

Because of the arbitrary restrictiveness of the zone of danger test, virtually half of the states have rejected it in favor of the "bystander rule," allowing recovery to bystanders outside the zone of danger who witness traumatic events. These states are Alaska, California, Florida, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia and Wyoming. *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987); *Dillon v. Legg, supra; Reynolds v. State Farm Mutual Automobile Ins. Co.*, 611 So.2d 1294 (Fla. Dist. Ct. App. 1992); *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566 (1989), *recons. denied*, 71 Haw. 664, 833 P.2d 899 (1989); *Mills v. Guthrie County Rural Electric Cooperative Association*, 454 N.W.2d 846 (Iowa 1990); *Lejune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990); *Culbert v. Sampson's Supermarkets, Inc., supra; Dzionkonski v. Babineau, supra; Nugent v. Bauermeister*, 195 Mich. App. 158, 489 N.W.2d 148 (1992), *appeal denied*, 503 N.W.2d 904 (1993); *Entex, Inc. v. McGuire*, 414 So.2d 437 (Miss. 1982); *Maguire v. State*, 254 Mont. 178, 835 P.2d 755 (1992); *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992); *State v. Eaton*, 101 Nev. 705, 710 P.2d 1370 (1985); *Corso v. Merrill, supra; Dunphy v. Gregor*, 261 N.J.Super. 110, 617 A.2d 1248

(1992); *Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987); *High v. Howard*, 64 Ohio St.3d 82, 592 N.E.2d 818 (1992); *Sinn v. Burd, supra; D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985); *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); *Gain v. Caroll Mill Co.*, 114 Wash.2d 254, 787 P.2d 553 (1990); *Heldreth v. Marrs, supra; Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986).

The "bystander test" was first articulated by the California Supreme Court in *Dillon v. Legg*. In *Dillon*, a mother and daughter witnessed an automobile strike and kill the mother's other daughter while she was crossing the street. The trial court granted defendant's motion for judgment on the pleadings as to the mother's claim for emotional distress because she was not within the zone of danger, but denied a similar motion in respect of the surviving daughter because there was evidence she was close enough to the accident to have been within the zone of danger and fear for her own safety. 441 P.2d at 915.

Reversing the trial judge, the state supreme court began its analysis with a recognition that courts' denial of such claims in the past on the grounds of a lack of "duty" was premised on the "twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims," 441 P.2d at 917, and that, "juries, confronted by irreconcilable expert medical testimony, will be unable to distinguish the deceitful from the bona fide. Rejecting those arguments, *Dillon* stressed that, "the possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the *entire class* of claims in which that potentiality arises." 441 P.2d at 917-18 (emphasis added). Nor, in *Dillon's* view, did the possibility of erroneous jury decisions support

the use of artificial tests as a replacement for case-intensive scrutiny:

> Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier.

441 P.2d at 918. In place of bright-line tests, *Dillon* adopted an approach focusing on the reasonable foreseeability of emotional injury as a result of a defendant's negligence. 441 P.2d at 919-20. To aid the courts in assessing foreseeability, the *Dillon* Court set forth three factors, which have since been characterized as "proximity," "contemporaneous observance" and "relationship" factors.[11] *Dillon* intended these factors to be employed by the courts as an aid in determining whether a particular accident and resulting harm were reasonably foreseeable, and that the courts, "on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." 441 P.2d at 921. Stated otherwise, the *Dillon* factors

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[11] The *Dillon* factors are:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

441 P.2d at 920.

were not intended to be "fixed" requirements which had to be satisfied as a perquisite to recovery, but were meant to serve as factors taken into account by the courts in assessing the degree of foreseeability. *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109, 114 (1985), *citing Paugh v. Hanks*, 451 N.E.2d at 764.

Although intended to broaden the right of recovery for emotional injuries, *Dillon's* bystander test has often operated to exclude meritorious claims. The reason is that many courts have hardened the *Dillon* factors into substantive rules of recovery. *See* Comment, *A Jurisdictional Survey* at 813-14; Bell, *The Bell Tolls* at 339-40.[12] Many of these jurisdictions, for example, condition bystander recovery on close familial relationships. *James v. Lieb; Gates v. Richardson*, 719 P.2d at 199; *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Covello v. Weis Markets, Inc.*, 415 Pa. Super. 610, 610 A.2d 50 (1992), *appeal denied*, 622 A.2d 1376 (Pa. 1993). Under these states' formulations, bystander recovery would be mechanically denied to lifelong friends, fiancees, co-workers, and even long-time co-

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[12] This rigid approach has been criticized by a number of courts and commentators. *Paugh v. Hanks; Culbert v. Sampson's Supermarkets; Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1043 (Alaska 1986); Comment, *A Jurisdictional Survey* 813 & n. 173 (listing other commentators criticizing the approach); *Ochoa v. Superior Court*, 39 Cal.3d 159, 216 Cal. Rptr. 661, 703 P.2d 1 (1985) (Bird C.J., concurring and dissenting). As stated by the Supreme Judicial Court of Maine in *Culbert*:

> [I]t should be remembered that since the imposition of liability is ultimately a factual determination which must be made on a case by case basis, the *Dillon* test should not be applied formulistically to bar arguably valid claims.

444 A.2d at 437.

habiting life-mates who do not establish the elements of common law marriage, all of whom could foreseeably suffer genuine emotional injury as a result of witnessing the death or serious injury of another.

In addition to the "physical impact," "zone of danger" and "bystander" tests, the presence of "objective physical manifestations" certifying the genuineness or seriousness of emotional injuries has been accepted as a sufficient basis for a negligent infliction action in a variety of situations in Massachusetts, Idaho, South Dakota, Washington, and Virginia. *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 605 N.E.2d 805 (1993) (gas explosion destroying home); *Czaplicki v. Gooding Joint School District No. 231*, 116 Idaho 326, 775 P.2d 640 (1989) (death of child because school principal failed to call ambulance); *Wright v. Coca Cola Bottling Co. of Central South Dakota, Inc.*, 414 N.W.2d 608 (S.D. 1987) (drinking soft drink from a bottle containing decomposing mouse); *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096 (1976) (*en banc*) (home struck by automobile); *Hughes v. Moore*, 214 Va. 27, 197 SE.2d 214 (1973) (same). The consensus in these authorities is that the "objective" evidence must demonstrate emotional distress of greater severity than " 'mere upset, dismay, humiliation, grief and anger,' " *Sullivan*, 605 NE.2d at 809-10, *quoting Corso v. Merrill*, 119 N.H. 647,653, A.2d 300 (1979). As stated in *Wright*:

> [T]he jury should be entrusted with determining whether the injury is so serious or substantial to warrant recovery. If the harm is trivial or temporary, falsified or imagined, the jury's decision will be made accordingly; . . .

414 N.W.2d at 610.[13]

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[13] As to the types of injurys found sufficient to satisfy this standard, see *Sullivan* (post-traumatic stress disorder with

Finally, a few decisions have rejected even the physical manifestations requirement in favor of a more fluid approach based upon foreseeability and the seriousness of the injury. *Johnson v. Ruark Obstetrics and Gynecology Associates*, 327 N.C. 283, 395 S.E.2d 85 (1990), *reh. denied*, 327 N.C. 644, 399 S.E.2d 133 (1990); *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282 (Me. 1987); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983) (*en banc*); *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980); *Montinieri v. Southern New England Tel. Co.*, 175 Conn. 337, 398 A.2d 1180 (1978).

C. Most Of The Historical Justifications For The "Zone of Danger" And Other Tests Have Been Repudiated

As discussed above, the reasons most often cited in the past as supporting the need for restrictions in this area are: (i) the potential for fraudulent claims; (ii) the fear of a "flood" of lawsuits; (iii) the view that medical science was ill-equipped to determine causation; and (iv) the concern over inflicting unlimited liability upon tortfeasors. The courts are now in virtual agreement that the first three concerns are baseless. *Sinn v. Burd* (containing a comprehensive refutation of all of the concerns); *Neiderman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970)

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attendant symptoms of sleeplessness, weeping, depression, despair, diarrhea and heart palpitation); *Czaplicki* (suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite); *Wright* (diarrhea, bitter taste and régurgitating); *Hughes* (anxiety reaction with phobia and hysteria); Restatement (Second) of Torts, Section 436A comment c (1965) (continued mental disturbance or continued symptoms as opposed to "transitory, non-recurring physical phenomena, harmless in themselves").

(same); *Culbert v. Sampson's Supermarkets*, (same). *See also Hunsley v. Giard* ("In the main, the reasons advanced by the courts for denying recovery, i.e., lack of precedent, increased litigation, remoteness, and fear of fictitious and feigned claims, have now been generally discarded"); *Gates v. Richardson*, 719 P.2d at 197 ("doing away with an entire class of negligence action solely because some of the actions may be tainted by mischief is like 'employing a cannon to kill a flea' "); *Dillon v. Legg*, 441 P.2d at 917, n.3 (1968) ("we point out that courts are responsible for dealing with cases on their merits, whether there be few suits or many;" rejecting the "flood" argument); *Bass v. Nooney*, 646 S.W.2d at 770 (no flood has resulted); *Orlo v. Connecticut Co.*, 21 A.2d at 404 (the difficulty tracing causation has been minimized by advances in medical knowledge). As summarized almost thirty years ago by the Supreme Court of Delaware:

> Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard. None of these problems are insuperable. Statistics fail to show that there has been a "flood" of such cases in those jurisdictions in which recovery is allowed; but if there be increased litigation, the courts must willingly cope with the task. As to the danger of illusory and fictional claims, this is not a new problem; our courts deal constantly with claims for pain and suffering based upon subjective symptoms only; and the courts and the medical profession have been found equal to the danger. Fraudulent claims may be feigned in a slight-impact case as well as in a no-impact case. Likewise, the problems of adequacy of proof, for the avoidance of speculative and conjectural damages, are common to personal injury cases generally and are surmountable, being satisfactorily solved by our courts in case after case.

Robb v. Pennsylvania Railroad Company, 210 A.2d at 714 (Del. 1965).

All the other policy reasons having been repudiated, it now appears that the only remaining concern arguably supporting the common law restrictions is a reluctance to impose unlimited liability on tortfeasors. The courts relying on this argument apparently worry that, without limits on liability, emotional injury cases will turn into virtual family reunions:

> The problem of unlimited liability is suggested by the unforeseeable consequence of extending recovery for harm to others than those directly involved in the accident. If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others in *loco parentis*, and even to sensitive caretakers, or even any other affected bystanders.

Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 423 (1969). As stated more recently by the District of Columbia Court of Appeals:

> "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident and *every distant relative* of the person injured, as well as *all his friends.*"

Williams. v. Baker, 572 A.2d at 1069 (emphasis added), *quoting* Prosser and Keeton, *The Law of Torts,* Section 54 at 366 (5th Ed. 1984). *See also Kelly v. Kokua Sales & Supply, Ltd.*, 56 Haw. 204, 532 P.2d 673, 676 (1975) ("without a reasonable and proper limitation of the scope of the duty of care . . . [tortfeasors] would be confronted with an

unimaginable, unbearable and totally unpredictable liability"); *Gates v. Richardson,,* 719 P.2d at 198 ("Some limitation on the class of plaintiffs is also justified by the potential burden on economic activity that an unlimited class could impose") (limiting bystander recovery to persons permitted to bring wrongful death actions); *Strickland v. Hodges,* 134 Ga. App. 909, 216 S.E.2d 706, 708 (1975) ("Pragmatic reasoning . . . has been the basis on which most jurisdictions have refused to impose liability . . . "); Comment, *A Jurisdictional Survey* at 790 ("the concern for exposing defendants to potentially unlimited liability . . . has been the most lasting policy limitation on actions for mental distress").

Underlying the concern over unlimited liability is the premise that it is "unfair" to tortfeasors to extend liability for their negligence beyond a certain point. As stated in *Halko v. New Jersey Transit,* the concern is over " 'the perceived unfairness of imposing heavy and disproportionate financial burdens on a defendant, whose conduct was only negligent for consequences which appear remote from the "wrongful act." ' " 677 F. Supp. at 139, *quoting* Prosser & Keeton, *The Law of Torts,* Section 54 (5th Ed. 1984) at 360-1.

As will be discussed below in detail, however justified the concerns over potentially ruinous liability are at common law, they are not justified in the context of FELA. The Act's own express limitations on the class of persons entitled to recover from the railroads effectively prevents carrier liability to remote and unforeseeable plaintiffs. Additionally, the FELA claimant's burden of proving traditional negligence elements, the practical difficulties discouraging the institution of formal litigation over petty emotional complaints and the alternative venue provided by the arbitration procedures established

under the Railway Labor Act will work together to dead-end the "parade of horribles" being marched before this Court by petitioner and its *amici*.

III THE COURT OF APPEALS PROPERLY BASED ITS DECISION ON AN EXACTING SCRUTINY OF THE FACTS GUIDED BY COMMON LAW DEVELOPMENTS AS GAUGED BY THE FELA

A. The Court of Appeals' Approach Properly Recognized The Tension Between The FELA And The Restrictive State Law Tests

As is clear from the above, there is a fundamental and profound tension between the remedial goal of the FELA to provide recovery to injured rail workers and the restrictive function of the "zone of danger" and other common law emotional injury tests. Recognizing this tension, the court of appeals in *Gottshall* declined to graft any particular state law test onto the FELA or otherwise to promulgate a "bright line" rule, relying instead on an exacting scrutiny of the facts to determine whether a plaintiff's claim (i) had a "solid basis" in common law and (ii) satisfied traditional tort elements. It is respondent's position that the court of appeals' approach wisely balanced the relevant conflicting interests and should be upheld by this Court. Petitioner's arguments that the court of appeals' approach allows recovery based upon the "bare showing" of an injury in violation of the FELA and would result in imposing "unlimited liability" on carriers are without merit.

The foundation of the court of appeals' approach is its recognition of the "fundamental tension" existing between the restrictive common law emotional injury tests and "policy underlying the FELA itself," which

"was enacted in broad, open-ended terms so that recovery will be liberally granted and that an employer's standard of conduct will be malleable, and adapt to the changing realities of industrial conditions and standards" (A-23 to A-24). As the court of appeals saw it, the challenge facing the courts in deciding the legal sufficiency of FELA emotional injury claims is to "reconcile the two policies, discerning the trends and developments in common law and then gauging them according to the policy underlying the FELA, for FELA is at issue here and creates the cause of action" (A-24).

Reviewing the history and remedial purpose of the FELA, including the Act's liberal construction and departures from common law (A-25 through A-30), the court of appeals reached the "inexorable conclusion" that, "[s]tate law tests are not the *sine qua non* for determining whether plaintiff has a cognizable FELA claim and doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims" (A-30). Accordingly, and because the mechanistic common law tests provide only a "dubious method" of separating meritorious from unmeritorious claims (A-31 through A-34), the court of appeals scrutinized the facts of the *Gottshall* case in detail, measuring them against *all* of the common law tests as a means of providing "a threshold assurance that there is a likelihood of genuine and serious emotional injury" (A-35), and the respondent had a "solid basis in the present state of common law to permit him to recover" (A-36).

B. The Court of Appeals Properly Found A Solid Basis In Common Law For Respondent's Claim

The court of appeals began its determination whether petitioner's claim had a solid basis in common law by

weighing it against the "bystander" test (A-36 to A-40). The court of appeals concluded that, with the exception of the family relationship element, the scenario represented a "classic common law claim." In the court of appeals' view, however, the fact that respondent and Mr. Johns were not blood relatives was not fatal to respondent's claims, because: (i) such a requirement would be inconsistent with the realities of the railway industry, where there "will hardly be a situation where one sees another family member injured while working"; (ii) FELA courts, unlike common law courts, are not concerned with "society as a whole" and need not fear extending bystander liability into the " 'fantastic realm of infinite liability,' " thereby burdening society as a whole; (iii) FELA courts are not concerned with the social policy ramifications of extending liability to unmarried or unrelated persons; and (iv) because a person might very well be traumatized by witnessing the death or severe injury of a close friend, the family relationship requirement is an arbitrary line inconsistent with the remedial and humanitarian goals of the FELA.[14]

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[14] A number of courts do not require a blood relationship between the victim and the witness-bystander as a prerequisite to recovery. *Leong v. Takasaki*, 520 P.2d 758 (Hawaii 1974); *Paugh v. Hanks; Dunphy v. Gregor*, 261 N.J. Super. 110, 617 A.2d 1248 (1992). Arguing against a blood or marital relationship requirement, one commentator has stated that,

> "The test (for recovery) should not be blood or marriage, but rather whether the judge or jury is convinced from all the facts that there existed such a rapport between the victim and the one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable."

12 F. Stone, *Louisiana Law Civil Treatise Tort Doctrine*, Section 170 (1977), *quoted in Lejeune v. Rayne Branch Hospital*, 566 So.2d at 570.

Although the court of appeals measured respondent's claim against the "bystander" test, it correctly pointed out that respondent was not a mere bystander but was an "active participant" in the events surrounding Mr. Johns' death, akin to the plaintiff in *Althoff v. Consolidated Rail Corporation*, No. 87-4384, *slip op.* (E.D. Pa. June 13, 1988) (plaintiff operated a crane which released an object that killed a co-worker) (A-40 to A-41). As summarized by the court of appeals:

> Here Gottshall was more than a mere witness at the scene. While not a cause, he was an active participant in the events leading to Johns' death. He was among the first to rush to Johns' assistance. He gave mouth-to-mouth resuscitation and CPR to Johns for a full forty minutes. He carried the body of his friend to the ambulance parked two thousand feet away. The sense of loss and helplessness as one's friend dies beneath one's breath and the resulting emotional injury that he would suffer is easily foreseeable.

(A-40 to A-41).

In addition to measuring respondent's claim against the "bystander" and "active participant" tests, the court of appeals found that respondent's claim was not one for purely emotional injuries but involved numerous sequalae sufficient to satisfy the common law "physical

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In the instant case, the relationship between respondent and Mr. Johns would clearly meet that test. Respondent had known Mr. Johns for fifteen years (GA-00004 to 00007). On weekends, they socialized at respondent's house, where they talked about railroad history (*id.*). As known by supervisor Norvick, respondent and Mr. Johns had worked closely on railroad production gangs, taking their meals and sleeping together on the same railroad cars (GA-00031).

manifestation" test, including respondent's loss of forty pounds, his diagnosis by three doctors of major depression and post-traumatic stress disorder, with anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares and fear of leaving home (A-42 to A-44).

Not discussed by the court of appeals, but amply demonstrated on the record, is that respondent's claim also satisfies the "zone of danger" test.[15] Initially, on the date of Mr. Johns' death, respondent was exposed to the same extreme working conditions that killed Mr. Johns. After Mr. Johns' death, and while Mr. Johns' corpse was lying on the ground, respondent was ordered back to work. The following day, respondent was again ordered to work under the same conditions. Certainly, performing hard physical labor in extreme heat and humidity at an accelerated pace and without work breaks involves a physical danger, and it is difficult to understand petitioner's unsupported assertion to the contrary. *See* Petitioner's Brief at 43.[16]

After reviewing the facts against various common law emotional injury tests, the court of appeals measured

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[15] Petitioner characterizes the factual basis of respondent's claim as "laboring alongside a colleague who suffers a heart attack while working under time pressure on an unusually hot day." In so downplaying the circumstances, petitioner demonstrates what should be clear from the factual record, namely, that whether respondent was within a "zone of danger" is a factual issue to be decided by a jury.

[16] Indeed, it would be well within reason for a jury to conclude that the above circumstances involved a "physical impact" upon petitioner, satisfying the most restrictive of the common law tests.

the circumstances in detail against the traditional negligence requirements of breach of duty, injury and causation (A-44 to A-56). Turning first to respondent's duty of care, the court of appeals emphasized that the situation facing respondent did not involve ordinary job stress or weather conditions "falling within the broad spectrum of conditions that constitutes ordinary working conditions" (A-46). Noting that, "[a]dverse weather conditions may constitute dangerous working conditions and impose upon the employer a duty to exercise a degree of care commensurate with the risks," (*id.*), the court of appeals summarized the extreme conditions facing petitioner on the date of Mr. Johns' death (A-47 to A-50). The court of appeals also reviewed the situation respondent was exposed to after Mr. Johns' death, including petitioner's ordering respondent back to work under the same conditions that had killed Mr. Johns, forcing respondent to watch Mr. Johns' body lying on the ballast for a full three hours, and requiring respondent to return to work during the following days under the same weather and working conditions (A-52 to A-53).

Under the totality of the circumstances, the court of appeals refused to conclude that petitioner was not negligent as a matter of law, stating that, "the facts, as presented to us and in light most favorable to Gottshall, present a genuine issue of material fact whether Conrail breached a general duty of acting with care and a duty to provide a safe workplace" (A-54).[17]

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[17] The court of appeals also found genuine issues to exist as to whether respondent sustained cognizable injuries and whether those injuries were causally related to petitioner's negligence (A-55 to A-56).

Concluding, the court of appeals emphasized that it did not view railroads as insurers of their workers' safety (A-56), or that liability should be found for "every possible distressful happening to which a railroad worker is exposed" (A-57). The court of appeals also made clear that it was not holding that every bystander to an accident has a valid FELA claim (A-63). Rather,

> [w]e simply hold that considering the totality of these extreme facts in the light most favorable to Gottshall – that is, seeing and actively participating in the events surrounding the death of a friend of fifteen years as a result of Conrail's actions, which includes working men under extreme conditions without taking the precautions arguably required, being forced to stay at the worksite by Conrail for several hours, being forced to be subjected to the same physical force after the accident without the benefits of the precautions arguably required, checking into a mental hospital for three weeks, losing forty pounds, exhibiting other physical manifestations of severe emotional injury, being diagnosed by three doctors as suffering from severe post-traumatic stress syndrome – Gottshall's claim has sufficient indicia of genuineness and he presents genuine issues of whether there is a breach of a duty, injury and causation. He is entitled under FELA to a trial on the merits.

(A-64).

C. Petitioner's Arguments Against the Court of Appeals' Approach Are Unpersuasive

Against the approach adopted by the court of appeals, petitioner advances two primary arguments: that (i) the FELA does not permit recovery based upon a "bare showing that an injury is genuine and foreseeable" and (ii) that the court of appeals' approach would impose

unlimited liability on the railroads.[18] Petitioner's arguments are without substance.

In support of its first point, petitioner argues that the court of appeals' decision is inconsistent with the FELA's common law roots, stating that the Act "always was and continues to be based on the common law principle of negligence, 'the breach of some duty found to rest upon the employer,' [citation omitted] and not solely on the fact that 'genuine' injuries have occurred." Petitioner's Brief at 13.[19] Petitioner is being coy. Nowhere does the court of appeals state or even imply that a cause of action

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[18] Petitioner's purported fear that the court of appeals' approach will subject it to unlimited liability, the cornerstone of its call to graft the "zone of danger" test onto the FELA, will be discussed in the next section.

[19] Petitioner also supports its argument that the court of appeals' decision is at odds with FELA's common law roots by citation to a number of this Court's earlier decisions. Petitioner's Brief at 14-15. In none of the cases relied upon by petitioner, however, was this Court called upon to decide whether certain types of injuries fell within the Act's coverage. Rather, the decisions cited by petitioner involve this Court's refusal (i) to read new types of *damages* into the FELA, *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988) (Pennsylvania prejudgment interest and "total offset" rules held not applicable in FELA); *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59 (1913) (refusing to provide survivors with loss of consortium damages); *Gulf, Colorado and Sante Fe Ry. Co. v. McGinnis*, 228 U.S. 173 (1913) (same); *American Railroad of Porto Rico v. Didricksen*, 227 U.S. 145 (1913) (same); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (same; Jones Act); or (ii) to extend the Act's coverage to persons other than a carrier's employees or servants. *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974) (FELA did not cover person who was not carrier's servant); *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960) (under facts of the case, company that repaired tracks for railroad was not railroad's agent).

for emotional distress under the FELA can be made out solely by establishing the genuineness of a plaintiff's injuries. To the contrary, after analyzing respondent's claim against the common law emotional injury tests to determine whether it had a "threshold guarantee" of genuineness, the court of appeals expressly and in detail measured the claim against the traditional common law elements of duty, injury and causation (A-44 through A-56). Indeed, the court of appeals was careful to state explicitly that, "We are not holding that every employee who suffers emotional injuries as a result of the railway employer's conduct has a valid FELA claim" (A-63).

The second argument offered by petitioner for its position that the court of appeals' decision is inconsistent with the FELA is that Congress intended the Act to cover only physical injuries peculiar to the railroad industry. Petitioner's Brief at 16-18. Petitioner relies on some colorful remarks about "life and limb" by Presidents Harrison and Roosevelt, together with certain portions of the FELA's legislative history. According to petitioner, this history, "reinforces the words of the statute," which, petitioner concludes, was meant to cover only physical and not emotional injuries.[20] Identical arguments were rejected by this Court long ago:

> We recognize of course that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously these were the major causes of injury and

[20] Respondent does not understand what petitioner means when it says that the Act's history "reinforces the words of the statute." The Act's wording does not limit the types of injuries covered in any way. To the contrary, as this Court has recognized, "[o]n its face," the FELA covers "every injury." *Urie v. Thompson*, 337 U.S. at 181.

> death resulting from railroad operations. But accidental injuries were not the only ones likely to occur. And *nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury* resulting "in whole or in part from the negligence" of the carrier. *If such an intent can be found, it must be read into the Act by sheer inference.*

Urie v. Thompson, 337 U.S. at 163 (emphasis added).

In addition to being incorrect in its reading of the Act's history and language, petitioner ignores the broad construction given the Act by this Court. For example, in arguing that Congress intended the Act to cover only "unusual" injuries, or injuries peculiar to the railroad, petitioner seems not to recognize that courts construing the FELA have applied the Act to a multitude of "non-railroad" type accidents and injuries. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963) (bug bite); *Lillie v. Thompson*, 332 U.S. 459 (1947) (assault); *Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248 (1963) (same); *Urie v. Thompson* (silicosis); *Gallose v. Long Island Railroad Co.*, 878 F.2d 80 (2d Cir. 1989) (dog bite); *Cazad v. Chesapeake and Ohio Ry. Co.*, 622 F.2d 72 (4th Cir. 1980) (fall into drain culvert on third-party premises); *Schweitzer v. Conrail*, 758 F.2d 936 (3d Cir. 1985) (asbestos-related injuries), *cert. denied*, 474 U.S. 864 (1985); *Moore v. Chesapeake & Ohio Ry. Co.*, 649 F.2d 1004 (4th Cir. 1981) (slipping on butter in cafeteria); *Atchison, Topeka & Santa Fe Ry. Co. v. Preston*, 257 F.2d 933 (10th Cir. 1958) (lipoid pneumonia and fibrosis of lungs); *Masiello v. Metro-North Commuter Railroad*, 748 F. Supp. 199 (S.D.N.Y. 1990) (sexual harassment); *Eng v. Southern Pacific Co.*, 210 F. 92 (D. Or. 1913) (constructing office); *Coal & Coke Ry. Co. v. Deal*, 231 F. 604 (4th Cir. 1916) (erecting telegraph pole), *error dismissed*, 245 U.S. 681 (1917); *Zimmermann v. Scandrett*, 57 F. Supp. 799 (D. Wis. 1944) (repairing door).

In summary, there is nothing in the court of appeals' decision contradictory to the FELA. To the contrary, as discussed above, the court of appeals' decision itself is deeply rooted in the history, language and construction of the Act.

IV. THE "ZONE OF DANGER" TEST IS UNNECESSARILY RESTRICTIVE IN THE CONTEXT OF THE FELA

A. There Is No Potential For Unlimited Liability In The Context Of The FELA

Petitioner urges this Court to ignore the past twenty-five years of common law experience with emotional injury claims and to read into the FELA the regressive and indisputably arbitrary "zone of danger" test. Petitioner's Brief at 33-43. The cornerstone of petitioner's position is that the zone of danger test will prevent the "unlimited liability" "out of all proportion to a defendant's fault" which it contends would result from "bystander" and other foreseeability tests.[21] Echoing the

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[21] Petitioner offers two other arguments, *to wit:* (i) the zone of danger test balances the interests of employees, carriers and society; and (ii) the zone of danger test is more consistent with congressional concern over physical injury and death than the approach adopted by the court of appeals. Petitioner's Brief at 34-5. On its first point, Petioner asserts that FELA "represents a careful balance between modified common law doctrines [the fellow servant rule, contributory negligence, assumption of risk and contractual waiver of liability] and new statutory remedies" and urges caution lest this "balance" be "upset." Petitioner's Brief at 34-5 and n. 14. Petitioner fails, however, to explain how emotional injury claims fit into this "balance" or how recognizing such claims might "upset" the balance. Petitioner's first point is fluff.

Petitioner's second point can be dispensed with summarily as well. As discussed above, this Court has flatly rejected assertions that the FELA is concerned wholly or primarily with

boilerplate hyperbole employed by some of the common law courts, petitioner condemns the court of appeals for having, "abdicated its judicial responsibility to determine the appropriate boundaries for negligent infliction of emotional distress claims under the FELA," and laments the " 'random and wayward' consequences" of bystander liability, which would "multiply 'damages incalculably.' " Petitioner's Brief at 24, quoting *Gaston v. Flowers Transportation,* 866 F.2d 816, 820 (5th Cir. 1989).

The position taken by petitioner and its *amici* that grafting the zone of danger test onto the FELA is necessary to save the railroads from ruinous liability demonstrate a fundamental failure to grasp the Act's own express limitations on the class of potential FELA claimants. Petitioner's assertions also sidestep an FELA plaintiff's burden of proving traditional negligence elements of duty, breach of duty, causation and injury, as well as the practical difficulties discouraging the institution of formal litigation over minor emotional complaints. Finally, petitioner overlooks the importance of the arbitration venue established under Railway Labor Act.

In short, in urging the zone of danger test, petitioner and its *amici* are asking this Court to solve a problem that does not exist.

Whatever the potential of bystander and other "foreseeability" tests to extend tortfeasor liability to remote and unforeseeable plaintiffs in the context of state common law, there is no such possibility in the context of the

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any particular type or class of injury. To "read into [the Act's] all-inclusive wording a restriction as to . . . the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Urie v. Thompson,* 337 U.S. at 181-2.

FELA. Fundamentally, the FELA significantly circumscribes the class of potential employee claimants by limiting a carrier's liability to injuries sustained by an employee *"while he is employed by such carrier . . . "* 45 U.S.C. Section 51; *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 319 (1974). Thus, it is axiomatic that in order to recover under the FELA, "a plaintiff must establish the requisite employment relationship with the defendant railroad." *De Shong v. Seaboard Coast Line R. Co.*, 737 F.2d 1520 , 1521 (11th Cir. 1984). The Act provides no cause of action for spouses, children, siblings, parents, aunts, uncles or "sensitive caretakers." *See New York Central & Hudson Railroad Co. v. Tonsellito*, 244 U.S. 360, 361-2 (1917) (father of injured employee – a minor – has no cause of action for loss of son's services); *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440 (4th Cir. 1993) (spouse has no loss of consortium claim under FELA), *cert. denied*, 114 S.Ct. 305 (1993); *Kelsaw v. Union Pacific Railroad Co.*, 686 F.2d 819, 820 (6th Cir. 1982) (same), *cert. denied*, 459 U.S. 1207 (1983); *Jess v. Great Northern Ry. Co.*, 401 F.2d 535, 536 (9th Cir. 1968) (same) (The FELA "not only provides the exclusive remedy for the recovery by an employee . . . , but also governs the recovery by others. . . . ").

A negligent railroad simply will not be confronted with a line of long lost uncles claiming their lives were ruined when they read in the paper about the death of nephew what's-his-name. Carriers facing emotional injury claims will answer only to their own employees.

Predictably, petitioner raises the prospect that in bystander cases, carriers theoretically could face emotional injury claims from any employee who happens to hear about an underlying accident:

> [T]he court in *Gottshall* concluded that it was foreseeable that Gottshall would experience an emotional injury because he saw his friend die and because he labored under the same working conditions as his friend.[22] Under the court's reasoning, it surely is no less foreseeable that other men on Gottshall's crew – or even men on other Conrail crews hearing of Johns' death – also would suffer emotional injuries because of the hard labor that their jobs required them to perform on a hot day.

Petitioner's Brief at 24.[23]

Contrary to petitioner's concerns, a carrier whose negligence results in physical injuries to one of its employees will not automatically be subjected to liability

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[22] As to the other men at the worksite when Mr. Johns' died, petitioner overlooks some important points. Respondent's particularly close relationship with Mr. Johns, apparently was not shared by their other co-workers. Respondent's unique and active involvment with Mr. Johns' death as the person who administered CPR to Mr. Johns' corpse for forty-five minutes, and respondent's being reprimanded by his superiors for having attempted to save Mr. Johns' life also add significantly to the mix of circumstances resulting in respondent's emotional collapse.

[23] Petitioner also cites *Gaston* for the argument that imposing bystander liability on the railroads would expand liability on the basis of factors "entirely incidental" to the carriers' operations, such as "how many crew members happen to be standing around to observe the incident, . . . " Petitioner's Brief at 37, *quoting Gaston*, 866 F.2d at 820. The *Gaston* court is factually incorrect in asserting that the presence, number and location of "bystander" employees is irrelevant to the operation of a railroad. Presumably, carriers staff their work crews in accordance with the needs of their jobs. If a certain number of men are present at a particular worksite, it is because the railroad places them there. And if, through the railroad's negligence, that job site is a dangerous one, it hardly seems unjust that the railroad compensate each man present for any serious injuries he genuinely sustains as a result of that negligence, whether the injuries be physical, emotional or, as in petitioner's case, a combination of both.

to every other employee, even those claiming to be friends with or related to the physically injured employee. Instead, an employee asserting emotional injury claims as a result of the death or injury of a third person will have to establish a *causal nexus* between his emotional injury and his *own job*. In the context of physical injuries, it is well-established under the FELA that an employee must prove that he sustained his injuries while acting within the scope of his own employment. *Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837 (7th Cir. 1991) (off-duty employee jogging on railroad property held to have no cause of action under the Act); *Fowler v. Seaboard Coastline Railroad*, 638 F.2d 17 (5th Cir. 1981) (employee riding motorcycle on railroad property during lunch hour held to have no cause of action); *Wilson v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 841 F.2d 1347 (7th Cir. 1988) (issues of fact preclude summary judgment against claim of employee injured while driving his own vehicle), *cert. dismissed*, 487 U.S. 1244 (1988); *Atchison, Topeka & Santa Fe Ry. Co. v. Wottle*, 193 F.2d 628 (10th Cir.) (off-duty employee hit by train on way to pick up groceries held to have no cause of action), *cert. dismissed*, 344 U.S. 850 (1952).

An employee's act will be found to be within the scope of his employment when it is either performed in the course of his work for the railroad or as a "necessary incident" to that work. *Erie Railroad Co. v. Winfield*, 244 U.S. 170, 173 (1917), *cited in Wilson v. Chicago*, 841 F.2d at 1355 and *Atchison, Topeka & Santa Fe v. Wottle*, 193 F.2d at 630. Distinguished from such covered acts are those " 'undertaken by an employee for a private purpose and having no *causal relationship* with his employment.' " *Wilson*, 841 F.2d at 1355 (emphasis added), *quoting*

Atchison, 193 F.2d at 630. *See also Fowler v. Seaboard Coastline Railroad Co.*, 638 F.2d at 18-19 ("We hold that coverage does not extend to activities undertaken by an employee for a private purpose and having *no causal relationship* to his employment . . . ") (emphasis added).

Just as an FELA plaintiff asserting physical injuries must establish a causal nexus between his own job and the activities giving rise to his injuries, so must a plaintiff claiming emotional injury under the Act. In the instant case, for example, had respondent taken the day off work, or been engaged at some other worksite, and learned of Mr. Johns' death secondhand, he would not be able to recover. The same would hold true for any other of Mr. Johns' friends and relatives who happened to have been respondent's employees but who were not present with Mr. Johns at the worksite when he died. Whatever their emotional injuries as a result of learning of Mr. Johns' death, they could not recover against petitioner because those injuries did not result *as a result of their own employment.*

In addition to the FELA's own limitations on the class of potential injury claimants, a number of practical and legal factors mitigate strongly against the possibility that this Court's adoption of a foreseeability-based approach would subject the railroads to unlimited and ruinous liability. Initially, as petitioner correctly points out, "there exists a diversity of psychological make-ups among railroad employees, just as among the general population, and different people inevitably will react to the same events in different ways." Petitioner's Brief at 24. When faced with the death of a co-worker, few railroad employees will suffer the type of serious emotional injuries necessary to expose carriers to large liability awards. The *Gottshall* case itself illustrates this. Present with Mr.

Johns and respondent were a number of other employees. Although everyone suffered emotional distress to some extent, only one, respondent, was injured seriously. Indeed, none of the other workers even brought a claim.

Had one or more of respondent's co-workers brought an FELA claim for their minor emotional distress, of course, they would have had to convince a jury not only that their injuries were foreseeable but that those injuries were both real and causally related to a breach of duty by petitioner. Even then, it is likely that any award they received for their minor distress would be minimal, and would not significantly increase the cumulative damages paid by petitioner in connection with the incident. In short, it is difficult to see how extending petitioner's liability from Mr. Johns to his co-workers would visit upon petitioner the "exponential damages" it purports to fear.

Finally, the tired predictions of an avalanche of cases offered by petitioner and its *amici* overlook the alternative venue provided by the Railway Labor Act. As petitioner itself recognizes, the RLA has established procedures for dealing with both major and minor disputes, the latter including those that grow out of, *inter alia*, working conditions. Petitioner's Brief at 27 and n.9. Railroad employees upset with general working conditions, disagreements with superiors and other such routine matters have a ready forum within which to air their grievances. They do not have to retain attorneys and incur the substantial expenses associated with formal litigation.[24]

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[24] A practical matter sidestepped by petitioner and its *amici* is that it would not be easy for employees merely "upset," "annoyed" or even "disgusted" by general working conditions or someone's bad manners to convince attorneys to undertake the expense and risk of prosecuting such claims in the federal or state court systems. Cries that the courts will be swamped by FELA claimants asserting "bruised feelings" or "emotional upset" are simply unrealistic.

In addition to its argument that, absent a zone of danger requirement, carriers will suffer vast increases in liability, petitioner contends that affording a cause of action for emotional injuries to bystanders and others not threatened with physical harm would be "unfair" because carriers cannot anticipate such injuries and take precautions to avoid them. Petitioner's Brief at 42. Petitioner's argument is without merit. There is no unfairness in making the railroads liable for the emotional injuries suffered by their own employees because it is the railroads themselves which place the employees in the situations resulting in the employees' injuries. The instant case is a good example. It was petitioner who assigned respondent to work with respondent's friend, Mr. Johns, in conditions that foreseeably could result in serious physical injury to a man in Mr. Johns' condition. It was petitioner who forced respondent to toil under those same conditions. It was petitioner who had canceled CPR training for respondent's co-workers, leaving respondent as the only person at the worksite who could, and therefore had to, blow breath into his friend's corpse for forty-five minutes, while his supervisor drove around the county searching for a telephone because petitioner had taken its emergency communications system off line without telling anyone. Finally, it was petitioner who forced respondent to continue working for three hours after Mr. Johns' death while Mr. Johns' body "bake[d] like a potato" in plain view. Respondent is not some "remote" claimant whose existence and relationship to Mr. Johns

were unknown to petitioner and whose emotional distress over Mr. Johns' death therefore could not have been foreseen and prevented.[25]

On a more fundamental level, there can be no argument that, as a matter of public policy, it would be "unfair" to impose liability upon the railroads for emotional injuries suffered by their employees as a result of the railroads' negligent acts. The public policy determinations concerning carriers' obligations were made in 1908, by Congress. As the court of appeals pointed out, "[i]n FELA, Congress, rather than the courts, created a cause of action and allocated the economic and social burdens" (A-39). For the past eighty-five years, carriers have been held liable for the physical injuries they negligently inflict on their own employees. There is no principled basis for shielding the railroads from responsibility for the emotional injuries suffered by their employees as a result of that same negligence.

B. The Zone of Danger Test Inappropriately Strips FELA Plaintiffs Of Their Right To Jury Trial In Whole Classes Of Claims

As discussed above, the FELA is an avowed departure from common law principles restricting recovery.

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[25] Nor should this Court entertain petitioner's argument that, "it is impossible for the defendant to estimate possible [emotional] injuries and make any assessment of damages." Petitioner's Brief at 42. The premise of this argument is that carriers' management personnel sit around and decide whether or not to engage in negligent conduct based upon how many workers they expect to be injured otherwise and that, whereas the carriers can predict the number of workers who would be physically injured by their negligence, they cannot estimate how many workers would be emotionally injured. Such a premise is facially absurd.

Sinkler v. Missouri Pacific Railroad. The Act was fashioned in broad language, which this Court has read even more broadly. *Buell*, 480 U.S. at 561-62. Indeed, in construing the FELA, this Court has not only refused to read common law restrictions into the Act's language, *Urie, Kernan v. American Dredging Co.*, but has shown its willingness to depart from common law principles where necessary to facilitate the policies of the Act. *Urie, Kernan, Rogers.*

Reading the zone of danger test into the Act, thereby extinguishing entire *classes* of emotional injury claims *as a matter of law* would run directly contrary to the above well-established principles. It would also be particularly offensive to the expanded role Congress afforded FELA juries through the 1939 amendments to the Act. Indeed, present efforts to impose common law restrictions on recovery for emotional injury parallel earlier efforts by some courts to use common law concepts to defeat recovery, in response to which the 1939 amendments were enacted. As explained by this Court in *Rogers v. Missouri Pacific R. Co.:*

> Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims *as a matter of law.* Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases – whether employer fault played any part in the employee's mishap.
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> . . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these cases exclusively in

> the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.

352 U.S. 509, 511 (emphasis added).

What petitioner seeks here is for this Court to erect barriers the function of which would be to defeat emotional injury claims *as a matter of law,* thereby removing such cases from the purview of the jury, as the lower courts did through the employment of assumption of risk and other common law limitations before the 1939 amendments to the Act. What those amendments and this Court's decisions teach, however, is that a jury decision is an integral part of the remedy provided by the FELA. *See Dice v. Akron, Canton & Youngstown Railroad Co.,* 342 U.S. 359, 363 (1952) (jury determination of factual questions is " 'part and parcel of the remedy afforded railroad workers' " by the FELA), *quoting Bailey v. Central Vermont Ry., Inc.,* 319 U.S. 350, 354 (1943). *See also Halko v. New Jersey Transit Rail Operations, Inc.,* 677 F. Supp. 135, 143 (S.D.N.Y. 1987), *citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 360, *reh'g denied,* 369 U.S. 882 (1962).[26]

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[26] Just as it would be offensive to the remedial purposes of the FELA and the expanded role that juries are to play in FELA cases for the courts to impose bright line rules excluding classes of claims as a matter of law, it would also be inconsistent with the Act's intent to allow such rules to dictate the terms under which the juries themselves could award recovery. As discussed above, the state law "physical impact," "zone of danger" and "bystander" tests have all been criticized as arbitrarily underinclusive of meritorious claims. Requiring FELA juries to apply those tests, or any of them, as substantive rules of recovery, rather than merely as guidelines in ascertaining the geniuneness and severity of claims would usurp the expanded powers of FELA juries.

V. THIS COURT SHOULD GO BEYOND THE COURT OF APPEALS' DECISION AND ADOPT AN APPROACH BASED ON TRADITIONAL NEGLIGENCE ELEMENTS.

As is clear from the above, most of the original justifications for the common law restrictions to recovery for emotional injury have been repudiated and the only remaining policy basis, the potential for subjecting tortfeasors to unlimited liability, does not exist in the context of the Federal Employers' Liability Act. As a result, there are no longer any interests against which to "balance" the remedial policy of the FELA, and no need to employ any or all of the restrictive common law paradigms. Accordingly, respondent urges this Court to move beyond the balancing approach employed by the court of appeals and hold that FELA emotional injury claims are to be evaluated by courts and juries under the same criteria as are FELA physical injury claims, to wit, duty, breach of duty, causation and injury. It is high time that some small area of the law unburden emotional injury claims from their presumption of illegitimacy and accord them evidentiary equality with claims for physical injuries.

CONCLUSION

For the foregoing reasons, respondent James E. Gottshall respectfully requests this Court to affirm the judgment of the Court of Appeals for the Third Circuit in *Gottshall v. Consolidated Rail Corporation* and remand with

instructions for the court of appeals to remand to the district court with instructions to set the case for trial.

Respectfully submitted,

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